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JUN 15 2012
TEXAS DEPARTMENT OF MOTOR VEHICLES
MOTOR VEHICLE DIVISION

June 13, 2012

Bill Harbison, Interim Director
Motor Vehicle Division
Texas Department of Motor Vehicles
200 East Riverside Drive, Building 150
Austin, TX 78768
Via Certified Mail

TXDMV
JUN 18 2012
ENFORCEMENT DIVISION

Re: Request for Formal Opinion per 43 TAC § 215.4

Dear Mr. Harbison:

Pursuant to 43 TAC § 215.4, we are respectfully requesting a formal opinion from the Texas Department of Motor Vehicles on behalf of a client regarding compliance with the Texas Occupations Code §§ 2301.006, 2301.251 and 2301.252.

As required by 43 TAC § 215.4(b), we are not aware that the subject matter of the request for formal opinion is the subject of any investigation or other proceedings by the Board or any other governmental agency.¹

Relevant Definitions

"Occupations Code Sec. 2301.002. DEFINITIONS. In this chapter:...

(3) 'Broker' means a person who, for a fee, commission or other valuable consideration, arranges or offers to arrange a transaction involving the sale of a new motor vehicle, other than a person who is:

(A) a franchised dealer or a bona fide employee of a franchised dealer acting

¹ 43 TAC § 215.4(b): Procedure. Requests for formal opinions are to be submitted to the Board in writing and shall include full and complete information on the matter with respect to which the formal opinion is requested. The request must affirmatively state that the matter involved is not the subject of an investigation or other proceeding by the Board or any other governmental agency. The submission of additional information may be required by the Board.

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for the franchised dealer;

(B) a representative or a bona fide employee of a representative acting for the representative;

(C) a distributor or a bona fide employee of a distributor acting for the distributor; or

(D) the owner of the vehicle at any point in the transaction.”

Relevant Statutes

“Occupations Code Sec. 2301.006. BROKERS PROHIBITED. A person may not act as, offer to act as, or claim to be a broker.

Occupations Code Sec. 2301.251. LICENSE REQUIRED: GENERALLY. (a) Unless a person holds a license issued under this chapter authorizing the activity, the person may not:

(1) engage in business as, serve in the capacity of, or act as a dealer, manufacturer, distributor, converter, representative, vehicle lessor, or vehicle lease facilitator in this state;...

Occupations Code Sec. 2301.252. LICENSE REQUIRED: SALE OF NEW MOTOR VEHICLES. (a) A person may not engage in the business of buying, selling, or exchanging new motor vehicles unless the person:

(1) holds a franchised dealer's license issued under this chapter for the make of new motor vehicle being bought, sold, or exchanged; or

(2) is a bona fide employee of the holder of a franchised dealer's license...”

Services at Issue

Our client provides a range of services within the car buying and selling industry. He holds an independent dealer license (General Distinguishing Number) from the Texas Department of Motor Vehicles as a used car dealer, but is not licensed as a new car dealer. This request for a formal opinion is limited to our client's desired services regarding the assessment, choice and negotiation for the purchase of new automobiles on behalf of the clients, as set forth below.

The consulting services offered by our client encompass helping individuals explore their ideal vehicles, which sometimes leads to the clients' purchase of a new automobile. Specifically, our client's assistance includes obtaining information from the clients pertaining to their price point and the type of automobile they would like to purchase (such as make, model, year, color), analyzing and providing information regarding the best match for the clients, assisting them with locating and test driving

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their ideal vehicle, and providing advice regarding private financing. Our client seeks an opinion that our client may accompany the interested clients to new car dealers as a non-biased, knowledgeable resource and advocate, and negotiate for a purchase price on the clients' behalf without violating the anti-brokering provisions of the Occupations Code. The clients would then sign the new dealer's paperwork and pick up the keys. By way of this request for a formal opinion, our client is seeking guidance from the Department of Motor Vehicles regarding the allowable scope of assistance that our client may offer related to new automobile purchases.

Our client does not provide a brokering service and will not take any fees, incentives, commission or other payments from the dealers; the clients compensate our client solely with an hourly fee for the consultation services, which is not tied with a commission or other contingency basis and does not vary if no vehicle is selected.

We have encountered a gray area regarding our client's services pertaining to new automobiles because our client is unable to act as a "broker" as defined by the Occupations Code. However, as outlined by the explanation of a "broker" in the Texas Administrative Code, we respectfully believe our client's services would be within legitimate parameters. Specifically, 43 TAC § 215.84 outlines as follows (emphasis added):

"(a) Under Occupations Code, §§2301.002, 2301.006, 2301.251 and 2301.252, **the definition of "arranges or offers to arrange a transaction" is construed as soliciting or referring buyers for new motor vehicles for a fee, commission, or other valuable consideration.** Advertising would not be included in this definition as long as the person's business primarily includes the business of broadcasting, printing, publishing, or advertising for others in their own names.

(b) A buyer referral service, program, plan, club, or any other entity that accepts fees for arranging a transaction involving the sale of a new motor vehicle is a broker. The payment of a fee to such an entity is aiding and abetting brokering. However, any referral service, program, plan, club, or other entity that forwards referrals to dealerships may lawfully operate in a manner that includes all of the following conditions:

- (1) There are no exclusive market areas offered to dealers by the program. All dealers are allowed to participate on equal terms.
- (2) Participation by dealers in the program is not restricted by conditions such as limiting the number of franchise lines or discrimination by size of dealership or location. Total number of participants in the program may be restricted if the program is offered to all dealers at the same time with no regard to the franchise line.

- (3) All participants pay the same fee for participation in the program that shall be a weekly, monthly, or annual fee, regardless of the size, location, or line-make of the dealership.
- (4) A person is not to be charged a fee on a per referral fee basis or any other basis that could be considered a transaction-related fee.
- (5) The program does not set or suggest to the dealer any price of vehicles or trade-ins.
- (6) The program does not advertise or promote its plan in a manner that implies that the buyer, as a customer of that program, receives a special discounted price that cannot be obtained unless the customer is referred through that program.
- (c) The provisions of subsections (a) and (b) of this section do not apply to any person or entity which is exempt from the broker definition in Occupations Code, §2301.002(3).
- (d) All programs must comply with Subchapter H of this chapter (relating to Advertising)."

It appears that whether or not our client can negotiate for the purchase of a new automobile on behalf of his clients without acting as a "broker" per the Occupations Code hinges on the interpretation of 43 TAC § 215.84(a) that "arranges or offers to arrange a transaction" refers to "soliciting or referring buyers for new motor vehicles for a fee, commission, or other valuable consideration." Our client's contemplated role regarding the purchase of new vehicles would be limited to locating available cars for purchase, assisting with test driving, negotiating purchase prices with the new car dealers, and suggesting available private financing options. Our client will not purchase the new automobiles for his clients, and will not have the authority to contractually bind the clients in their purchase of a new automobile. As noted, our client's fees are based exclusively on an hourly rate paid by the clients, and he would not take monies from the new car dealers or any type of fee contingent upon the purchase of a new automobile. Our client does not seek to "solicit or refer" buyers, but instead to help the clients locate ideal vehicles, and to potentially discuss the purchase price of the vehicles with the new car dealer on behalf of the clients.

Our client's contemplated assistance with new vehicle purchases seems to be within the spirit of the Texas Administrative Code, which provides as follows:

"Occupations Code, Chapter 2301, and Transportation Code, Chapters 503 and 1000 through 1005, require the Department of Motor Vehicles to license and regulate motor vehicle dealers, manufacturers, distributors, converters, representatives, lessors and lease facilitators, in order to ensure a sound system of distributing and selling motor vehicles, provide for compliance with manufacturer's

warranties, prevent fraud, unfair practices, discrimination, impositions, and other abuses of the people of this state in connection with the distribution and sale of motor vehicles. The sections under this chapter prescribe the policies and procedures for regulating motor vehicle dealers, manufacturers, distributors, converters, representatives, lessors and lease facilitators, by regulating licensing, warranty performance obligations, advertising, enforcement, and providing for adjudicative proceedings."

The Administrative Code contemplates that its regulations will be protecting Texas citizens from "abuses" including fraud and unfair practices. Our client's service will ensure that the clients are fairly represented in the negotiation and sales process of new motor vehicles, which has the impact of protecting the clients from potential unfair practices. Our client will serve as their advocate and knowledgeable resource, providing the experience in order to connect the clients with their ideal vehicles.

On behalf of our client, please respectfully accept this request for a formal opinion and find that the above-described services do not violate any provisions of the Occupations Code. If we may provide any additional information or if you have any questions, please do not hesitate to contact us.

Very truly yours,



Rebecca J Sobie